

CREATOR'S LOGGING,)	AGBCA Nos. 2002-132-1
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Appellant)	
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Representing the Appellant:)	
)	
Michael McKinley, pro se)	
HC 32, Box 334)	
Mt. Judea, Arkansas 72655)	
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Representing the Government:)	
)	
Barry D. Hersh, Esquire)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
3201 Federal Building)	
700 West Capitol Street)	
Little Rock, Arkansas 72201)	

DECISION OF THE BOARD OF CONTRACT APPEALS

July 18, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

These appeals arise out of timber sale Contract No. 0810-03-012765, the McMinn Knob sale between Creator's Logging, owned by Michael McKinley, an individual (Creator's Logging or purchaser) of Mt. Judea, Arkansas, and the U. S. Forest Service (FS or the government), Ozark-St. Francis National Forests, Russellville, Arkansas, an agency of the U.S. Department of Agriculture. Award date was April 13, 2001, and the termination date is October 15, 2003.

The purchaser's operations were suspended from January 2 through January 7, 2002. Purchaser claims entitlement to an equitable adjustment in the total amount of \$47,012. Of the total, he claims \$19,320 in lost production for the five days of the suspension. He also claims that the suspension resulted in two workers quitting, causing a 14 day shutdown of one crew before he was able to replace them. Had the shutdown not occurred, the purchaser claims this crew would have produced 42 loads with a total value of \$46,386 during those days. Finally, he claims that he lost one production load because the technical sale administrator stopped production to talk to crew members.

The Contracting Officer (CO) denied the claims in their entirety in a decision dated March 12, 2002.

These timely appeals were received at the Board June 10, 2002.

The record consists of pleadings and the Appeal File. Both parties were afforded an opportunity to supplement the record with affidavits or additional documents. Neither did so. Neither party requested a hearing and the appeal is being decided on the written record pursuant to Board Rule 11. Each party submitted a brief.

The Board has jurisdiction to hear these appeals under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. The CO awarded timber sale Contract No. 0810-03-012765, McMinn Knob timber sale, to the purchaser April 13, 2001. The contract consisted of three divisions: AT- Specific Conditions, BT - Standard Provisions, and CT - Special Provisions. (Appeal File (AF) 40.) The Standard Provisions (BT clauses) were not physically included in the contract.

2. Standard provision BT2.132 addresses negligent or willful damage. It provides for the inclusion by the FS of undesignated timber meeting utilization standards and unnecessarily damaged or negligently or willfully cut by the purchaser (DBT 113).¹ BT3.44 provides that timber so included is to be cut, removed and paid for by the purchaser at current contract rates and required deposit in addition to liquidated damages under BT3.45 (DBT 116). BT3.45 specifies that liquidated damages for unnecessary damage to or negligent or willful cutting of undesignated timber are to be paid by the purchaser in an amount equivalent to and in addition to the amount payable at current contract rates for such timber (DBT 116). The contract does not include a standard to measure acceptable versus unacceptable damage to a tree.

3. Standard provision BT6.3 requires a purchaser to conduct operations in a workmanlike manner. BT6.32 requires that the purchaser's operations not unnecessarily damage young growth or other trees to be reserved (DBT 121). BT6.42 prohibits, insofar as ground conditions allow, skidding against reserve trees. BT6.422 requires that location of all landings, tractor roads and skid trails be agreed upon prior to their construction, and that cleared or excavated size of landings not exceed that needed for safe and efficient skidding and loading operations (DBT 122). The contract does not include a standard to measure acceptable versus unacceptable damage to a tree.

4. Standard provision BT9.3, Breach, provides, in pertinent part, as follows:

In event Purchaser breaches any of the material provisions of this contract, Forest Service shall give purchaser notice of such breach and, allowing reasonable time for

remedy of such breach and of Forest Services' election to suspend, may give notice

¹ Standard provisions are not included in the Appeal File. At the Board's request for BT clauses for this contract, the FS furnished "Timber Sale Contract, Division BT, Standard Provisions for Timber Sales to be Measured Before Felling," October, 1972, pp. 110-128. Citations from this document are referred to herein by its page numbers. For example, Division BT (DBT), p. 110 will be cited as DBT 110.

to suspend all or any part of Purchaser's Operations

Immediately upon oral or written suspension, Forest Service representative shall notify the Forest Supervisor of the suspension and related circumstances. The Forest Service representative shall promptly review the suspension to determine if the suspension should be continued or lifted. Such suspension shall be lifted as early as conditions permit

(DBT 127.)

5. Special Provision CT2.3 provides that, notwithstanding designations for cutting under other provisions of the contract, live or dead shelterwood reserve trees or groups of reserve trees within cutting units or clearings "shall be left uncut." The clause further provides that these reserve trees were to be identified by an orange band located at eye level and were required to be protected in accordance with CT6.32 (AF 53). CT6.32 is, however, not listed as included in the contract. The List of Special Provisions expressly states that unless listed therein, no provision of Division CT was to have force and effect (AF 51).

6. The purchaser submitted his plan of operation on June 6, 2001. Operations commenced thereafter. On several occasions in the summer and fall of 2001, timber sale inspection reports indicated that reserve trees had been skinned or rubbed or had bark scuffed (AF 106, 110, 113, 115-117, 119, 121-122, 126, 128). The purchaser was made aware of these conditions both orally and in writing (AF 113-115, 118, 120-122, 125-127). These inspection reports were prepared by the Timber Sale Administrator (TSA) or the Forest Service Representative (FSR). In some cases, the TSA or FSR issued a warning; in others there was a determination of no negligence. On other occasions, liquidated damages were assessed.

7. Concurrent with the incidents of skinned reserve trees, the inspection reports also made note of a problem with hauling not keeping up with felling, resulting in trees being decked in unapproved areas. This slow hauling and unauthorized decking situation was a contributing factor to the problem tree damage problem. By November 15, 2001, hauling had temporarily caught up with felling thereby freeing up decking space (AF 117). However, as of November 20, there were several piles of decked timber. The FS found the amount excessive. The inspection report for that date noted that no more cut trees should be placed against reserve trees (AF 119). As of December 5, trees continued to be decked against reserve trees (AF 122). On December 9, the inspector talked to the purchaser about unapproved decking along the temporary road (AF 123). However, the condition still existed on December 21, and the matter was again discussed with the purchaser (AF 125). The next day more trees had been decked on the temporary road edge along the reserve trees. The purchaser was told to remove the decked trees and not to add to the problem by decking more (AF 126).

8. By letter of Wednesday, January 2, 2002, the FSR, Stephen L. Overton, suspended felling and skidding under the contract citing provisions BT6.42 and BT6.422. In so doing, he referred to the purchaser's continued skinning of reserve trees and decking between authorized areas for

decking. He confirmed an oral suspension of the same day. The suspension was to be effective until the purchaser provided written documentation of a plan to avoid such activity in the future and paid liquidated damages on the reserve trees. The purchaser was given 30 days to provide the documentation. (AF 133.)

9. The purchaser replied to the FSR the same date, January 2, 2002. He stated that in the future he and his crew would deck only in authorized areas and would conduct operations in a manner to avoid contact with reserve trees. He authorized deducting liquidated damages from unencumbered funds. (AF 135.)

10. Both the inspector and the purchaser were on site Friday, January 4, 2002. The purchaser's trucks were hauling. Wood was still decked on both sides of the road and the purchaser indicated his plan to move the wood on that day and the following day (Saturday, January 5, 2002). (AF 131.)

11. On Monday, January 7, the CO lifted the suspension, allowing cutting and skidding operations to resume. In the letter lifting the suspension, he made reference to the purchaser's plan to "conduct operations in a manner to avoid contact with reserve trees," indicating that he interpreted that language to mean that the purchaser would adhere to the requirement in Standard Provision BT6.3 - Control of Operations, stating that the purchaser's operations were to be conducted in a workmanlike and orderly manner. (AF 134.)

12. Thereafter, the purchaser submitted an undated written claim. A handwritten notation indicates that it was received at the FS office in Russellville, Arkansas, on March 1, 2002. Therein, the purchaser asserts that most of the trees identified in inspection reports as having been skinned were not considered skinned enough to be considered damaged. He also contends that at least five of the seven or eight trees he conceded were skinned, were trees that he had requested to be removed because they were in the way of operations. The purchaser's position regarding decking in unauthorized areas is that the areas had previously been approved by the TSA. He contends that this verbal permission was withdrawn after he asked that the TSA refrain from speaking directly to his crew members about damage to trees or other actions. He alleges that the suspension caused him damages in the total amount of \$47,012. These damages are calculated by using an average load value of \$644. For the five days of the suspension, he calculates a loss of \$19,320 based on two crews producing three loads each per day totaling 30 loads. He also alleges that the suspension caused him to lose two crew members and that it took him 14 days to replace them. This, the purchaser contends, shut down one crew for those 14 days resulting in a loss of three loads per day for 14 days or 42 loads. At \$644 a load, he claims a loss of \$27,048. Finally, he claims loss of another \$644 for time when the TSA stopped production to talk to crew members. (AF 146-47.)

13. The CO denied the purchaser's claim in a letter dated March 12, 2002. The CO responded to the purchaser's claim that the suspension was unreasonable by reference to inspection reports documenting skinned, rubbed or broken reserve trees. The records show that in some cases, the purchaser was warned and in others, liquidated damages were imposed. In still others, the action was either determined to be not negligent or no action was taken. The CO found the repeated incidents of skinned trees after warnings to justify the suspension. Regarding the purchaser's contention that the suspension was unreasonable because decking in unauthorized areas was verbally

approved by the TSA and later altered after he complained that the TSA should not speak directly to his workers, the CO noted that the purchaser was warned at least three times that decking along the temporary road was not approved and logs were to be moved to an approved landing. The CO concluded that the purchaser was in breach of the contract and that the purchaser's explanations did not nullify the CO's authority to suspend felling and skidding operations. (AF 149-55.)

DISCUSSION

Contentions of the parties

The purchaser claims that "numerous inconsistencies" in the contract support the claim. He points out that CT6.32 is not in the contract but has been included in the AF at page 164. He also contends that the FS definition of damage to a tree requires that there be at least 144 square inches of skinned bark to constitute damage to a tree. Secondly, the purchaser claims that it is discriminated against based on its status as a small business. Finally, the purchaser asserts the fact that the TSA and the CO are married to one another constitutes a conflict of interest.

The FS brief pointed out that the contract provides no standard to measure damage to a tree, not 144 square inches or any other figure. Rather the amount of damage from which a tree can recover depends on the size of the tree. The FS also cited BT6.32, prohibiting damage to young growth or other trees to be reserved and CT2.3 identifying their location. The brief noted the purchaser was told in writing and orally in several instances that he was creating too much damage to trees. In response to the claim of discrimination based on the purchaser's small business status, the FS asserts that almost all of the purchasers on the Ozark National Forest are small businesses. The FS disputed the relevance of the purchaser's claim that there had been an agreement to use the area in question as a decking area as it was clear that once such use resulted to damage to the trees, any such oral permission was withdrawn. The FS denied that the relationship between the CO and the TSA created a conflict of interest or that it contributed to the suspension. Finally, the FS asserted that the suspension caused no hardship to the purchaser. Hauling of logs was not suspended, only felling and skidding operations. These operations were suspended until enough timber could be hauled to create space to deck more trees on the authorized landing. According to the FS brief, this hauling operation took five days, including the weekend.

Analysis

What the purchaser in essence claims here is that the suspension was unjustified and therefore a breach of contract occurred. Where a purchaser breaches a material provision of the contract, the Government is allowed to suspend all or any part of its operations (Finding of Fact (FF) 4). The purchaser has the burden to prove a claim for breach. Jerry Wooton, AGBCA No. 86-226-3, 87-1 BCA ¶ 19,705; Green Planting Co., AGBCA Nos. 85-195-3, 85-288-3, 86-2 BCA ¶ 18,808; Soland Enterprises, AGBCA No. 84-339-3, 85-3 BCA ¶ 18,479; Paul Warner Enterprises, Inc., AGBCA No. 84-269-3, 85-1 BCA ¶ 17,809.

The contract prohibits unnecessary damage to reserve trees. This prohibition is repeated and material (FF 2, 3, 5). The contemporaneous record indicates numerous instances of skinned reserve trees and of warnings to the purchaser (FF 6). The damage was caused in part by the fact that hauling was lagging behind felling and skidding, causing cut timber to be stacked against reserve

trees (FF 7). As a result, the FS suspended felling and skidding operations until enough trees had been hauled to remedy this situation (FF 8). Suspending felling and skidding was a reasonable exercise of the Government's contractual rights under BT9.3 and did not constitute a breach of the contract.

The purchaser is correct in stating that CT6.32, referenced in clause CT2.3, is not itself included in this contract. That omission, however, does not nullify the other contract provisions requiring protection of reserve trees. We have also considered the purchaser's arguments of discrimination and conflict of interest. We find no evidence whatsoever that the purchaser's small business status in any way influenced any FS actions. Similarly, the purchaser presents only bare non-specific allegations of a conflict of interest arising out of the relationship between two FS employees. Purchaser has not alleged, much less proved, any specific action or harm because the relationship exists.

Having found no breach, we find no entitlement to damages. For that reason, we need not address the issue of damages. We would, however, comment that the purchaser's operations were not completely suspended. During the five days of the suspension, the purchaser continued operations, hauling trees already felled and skidded, work that would have to be accomplished at some point. The purchaser has presented no proof of a loss. Thus, he would not be entitled to recovery even if the suspension was not justified.

DECISION

The appeals are denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D. C.
July 18, 2003